Supreme Court of the United States

OCTOBER TERM, 1965.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*, *v.* ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee.*	No. 368.

APPELLANT'S OBJECTION TO MOTION OF AMICUS CURIAE TO FILE A SUPPLEMENTAL BRIEF

Appellant opposes the filing of a second amicus brief by Citizens for Decent Literature, Inc. (hereinafter "CDL"). Even if CDL were a party, this second brief would be inappropriate. Rule 40 embodies the established procedure of opening brief, response, and reply. CDL's first amicus brief, a 108-page document, was addressed specifically to appellant's jurisdictional statement, which contained the substance of the arguments made in appellant's main brief. Since the amicus brief was filed too late for appellant to respond prior to the oral argument, appellant sought leave to file a supplemental brief after argument in reply to CDL, and leave was granted. Appellant's supplemental brief was served and filed on December 16, 1965, in accordance with the Chief Justice's direction that it be filed promptly (the argument having been concluded on December 8). More than two weeks later, amicus seeks leave to file a second brief.

Rule 41(5) specifies the occasions for filing a supplemental brief, and none of them are present here. Rule 41(6) permits the receipt of a brief after argument upon special leave, but special leave implies special circumstances, which do not exist here. Those Rules, of course, apply to parties. Rule 42 shows that the function to be performed by an amicus, relative to that of a party, is a restricted one.

The proposed second brief contains no points going to the merits that have not already been urged. It seeks to justify the inclusion in the first CDL brief of matter that was neither part of the record nor the subject of judicial notice—matter in some instances not even identified by source. The filing of a second amicus brief for such a purpose is not warranted. Apart from this effort, the proposed second brief does no more than expound points already urged in the first CDL brief. In repeating these points, however, the second brief intrudes serious distortions and inaccuracies, to which response ought to be made if the proposed second brief is to be accepted. Included among them are the following:

I*

CDL, without any justification for it, attempts to take on the mantle of spokesman for all states other than Massachusetts (6-7). At the same time CDL suggests that our basic judicial process of determining issues as they are presented by parties to a litigation be abandoned (7-8). What process CDL would substitute is not clear. It is clear, however, that CDL does not speak for the various states which it assumes to represent. The law enforcement officials of those states are of course able to speak for themselves, and, when they think it appropriate, they of

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* The items that follow are arranged under the numerical headings of CDL's proposed second brief. Numbers in parentheses refer to pages of that brief.

course know how to make their views known. (*Cf. Gideon* v. *Wainwright*, 372 U. S. 335.) CDL makes specific reference to Illinois and New Jersey. The Supreme Courts of Illinois and New Jersey have dealt with the matter of anti-obscenity legislation and the effect of *Roth* and *Alberts*, and surely the law enforcement officials of those states are not unfamiliar with the issues. The Prosecutor of Bergen County, who conducted the case involving *Memoirs* in New Jersey, has been aware of the progress of the present case; the appeal in New Jersey was postponed pending the disposition of the present appeal.

CDL itself stresses the contrast between its own views and those of the Solicitor General in No. 42 and of the New York County District Attorney in No. 49, as well as with those of the Massachusetts Attorney General in the present case. We submit that these public officials speak for their respective governments with greater warrant than does the private organization that submits these amicus briefs, and with greater appreciation of the constitutional issues involved.

In its brief previously submitted, CDL referred to matters which were not only outside the record, but which could in no event be deemed proper subjects for judicial notice. It now offers three asserted justifications for this. One is in the material commented on above. Another depends on a bizarre misreading of the phrase "independent constitutional judgment". CDL would have it mean, apparently, that the judgment referred to is to be independent of the record; the proposed brief states that an independent constitutional judgment "necessarily entails" facts outside the record (9). The third is allegedly found in the language of Mr. Justice Brennan in *Jacobellis* (10). But there is nothing in that language suggesting that consideration be given to matters that lie both outside the record and outside the scope of judicial review. Indeed, what is referred to in the portion of the opinion quoted by CDL was part of record in that case (Transcript of Record in *Jacobellis*, pages 361, 488-495, 497).

II

CDL argues that the word "redeeming" in the *Roth-Alberts* phrase "utterly without redeeming social importance" requires a balancing of the quantum of social importance against the quantum of appeal to prurient interest (12-13).* The context in which the phrase appears, and the use of the word "utterly", emphatically negate the balancing that CDL is advocating, a balancing that was employed in some cases prior to the time when this C[illegible] made it clear that the operation of anti-obscenity legislation presents constitutional issues.

The sense of the word "redeeming" as used in *Roth-Alberts* is this: social importance redeems from suppression material which, but for the presence of social importance, might come within the scope of anti-obscenity legislation. The plain meaning of the statement in *Roth-Alberts* (repeated in the opinion of Mr. Justice Brennan in *Jacobellis*) is that the presence of social importance invokes the protection of the First Amendment, and thus overrides considerations that would argue for suppression in the case of material utterly lacking that importance.**

If there had been any doubt about whether this is the meaning of the *Roth-Alberts* statement, the doubt could not

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* It may be noted that the italics which CDL uses in quoting appellant's supplemental brief (12) are not in the original. Moreover, contrary to the CDL statement that follows the quotation, there has been no acknowledgment by appellant that "the spotlight is cast upon" the word "redeeming". We do not "spotlight" that word, nor do we ignore it. Its function in the *Roth-Alberts* statement is as described in what follows.

** Appellant does not, of course, rest on the social importance test alone. As set forth in our main brief and our reply to appellee, we urge that *Memoirs* does not have the morbid and unhealthy elements that constitute prurient interest, or the grossly repellent patent characteristics that constitute patent offensiveness.

survive the expatiation of the statement in *Jacobellis* by the Justice who was its author in *Roth. (City of Chicago* v. *Kimmel,* 31 Ill. 2d 202, 201 N. E. 2d 386; *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497; *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760; for earlier views, see *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 920, 383 P. 2d 152, 165; *State* v. *Hudson County News Co.,* 41 N. J. 247, 265, 196 A. 2d 225, 235.)

CDL refers to *United States* v. *West Coast News,* 228 F. Supp. 171 (W. D. Mich.), in support of its argument that witnesses testifying as to literary merit are necessarily biased (15-16). That case serves only to underscore the difference between matters which are properly the subject of testimony in cases such as this and matters which are not. The *West Coast News* opinion shows that the witnesses there, testifying on contemporary community standards, went on to express their views on obscenity laws generally. In the present case, by way of contrast, the witnesses called by the appellant testified only on a subject as to which they were qualified as experts—the matter of whether *Memoirs* has literary value or historical significance. They did not testify as to matters of law, or on other subjects as to which their opinions would not constitute evidence. (The one witness for the appellee, however, was permitted, over objection, to state conclusions of law.) The kind of testimony referred to in the *West Coast News* case emphasizes the reliability of testimony such as has been given in the present case, testimony within the professional competence of witnesses whose professional reputation is involved, and who are called upon to give a detailed appraisal of a particular work and not their general views on whether something is obscene or on what the law ought to be.

Under this same heading, CDL states that this Court denied certiorari "in the New York conviction of Lenny Bruce" (18). In fact, the case in which certiorari was denied (*Bruce* v. *Hogan,* 381 U. S. 946) was one in which Bruce sought a federal court injunction against state court

prosecution. The question of obscenity in the Bruce performance was not decided in the federal action; that question is still pending in the New York appellate courts.

III

In returning to its reliance on *Rex* v. *Curl,* CDL makes unusual use of other opinions. CDL quotes the opinion of Judge Burke in *Trans-Lux Distributing Corp.* v. *Regents,* 14 N. Y. 2d 88, 198 N. E. 2d 242, without mentioning the fact that the Court of Appeals was reversed by this Court *per curiam* (380 U. S. 259), and without taking note of the fact that Judge Burke's views on artistic merit no longer represent the majority view of the New York Court of Appeals (*Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 299, 200 N. E. 2d 760 (22-23)). In footnote 16 (21), CDL offers two quotations. One is from an unnamed and uncited 1887 opinion. This is *Mugler* v. *Kansas,* 123 U. S. 623, a case upholding a liquor-prohibition law. No question of freedom of expression was involved there. The material in parentheses in the CDL quotation is the CDL's language, not the Court's. And the "such questions" to which the Court's language refers are described in the preceding sentence of the opinion, which CDL does not include:

> "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public?" (123 U. S. 623, 660).

The other quotation is from *Trist* v. *Child,* 88 U. S. 441. *Trist* v. *Child* was not an obscenity case, nor did it involve morality in the sense in which CDL uses the term. The Court held, *inter alia,* that a contract to pay for services in securing Congressional enactment of a bill to pay Trist for his work in connection with the Treaty of Guadelupe Hidalgo was unenforceable as against public policy. The opinion is in no way authority for CDL's views on

sexual morality and the suppression of books. The decision rests on the public interest in preventing interference with the legislative process. Moreover, far from supporting CDL's attitude toward the Bill of Rights, the opinion emphasizes the importance of the guaranteed freedoms. CDL omits the conclusion of the *Trist* paragraph which it quotes. The conclusion is as follows:

> "* * * No people can have any higher public interest, *except the protection of their liberties,* than integrity in the administration of their government in all its departments." (88 U. S. 441, 450-451.) (Emphasis supplied.)

CDL complains that appellant's reply to the first amicus brief omits part of the report of *Curl's* case (20) . For one thing, the "omitted" part was set forth in the first CDL brief (at pages 57-58). For another, this portion of the report, which CDL has now quoted a second time, adds nothing—either for or against—to the point made in appellant's supplemental brief. The rationale of *Curl's* case was that the suppression of speech and writing ought to be used as a government tool against sedition, against heresy, and against expression thought to be damaging to the prevailing sexual morality. The point made in appellant's reply was that this philosophy of government is not the philosophy of our government, and that it was explicitly rejected in the adoption of the First Amendment.* Anti-obscenity legislation has a valid scope of operation, but it is a scope severely limited by constitutional guaranties

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* "* * * to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' * * *

"* * * No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. * * *" (*Bridges* v. *California,* 314 U. S. 252, 264, 265).

that were not in existence at the time of *Curl's* case. The theory of *Curl's* case would require a different result in *Kingsley Pictures* v. *Regents*, 360 U. S. 684. It is a theory that is completely foreign to the spirit of *Roth-Alberts*. It cuts deeply into the fabric of freedom and stands in rigid opposition to the solicitude for First Amendment protections shown in *Roth* and *Alberts*. Yet that destructive rationale, as the repeated reliance on *Rex* v. *Curl* shows, is the very essence of the CDL position.

IV.

CDL deals with the right to jury trial as though the Sixth Amendment spoke not of the right of "the accused", but of a right of the prosecution (23-24; also footnote 7 on p. 8). CDL then confuses the "full hearing" that the First Amendment assures for the publication of conflicting views with "full hearing" in the courtroom. In any event, the litigant's choice of whether he will or will not have a jury has no relevance to the question of what speech and writing are protected by the First Amendment.

V.

Footnote 20 (25) presents one of several illustrations the CDL furnishes of the necessity for deciding cases on the record and on matters as to which judicial notice may be taken. CDL states:

> "It is a recognized fact that publishers locate themselves in the liberal jurisdictions and take sanctuary in the relatively low risk of state prosecution."

It is, on the contrary, a recognized fact that appellant and most other leading publishers have long been located in New York City for reasons in no way connected with anti-obscenity laws. In any event, a state that has held the works of Edmund Wilson and Henry Miller obscene would

be a poor choice if the book publishing industry had the motivation that CDL ascribes to it.

CDL concludes with an assertion that appellant has made an "attempt to prove that the rights of a publisher *under all circumstances* are paramount to the police right of community government" (26). (Italics by CDL.) No such contention has appeared anywhere in appellant's briefs or oral argument. Appellant has at no point urged the invalidation of all anti-obscenity legislation, or of the particular statute involved here. Appellant's position, rather, has been that, under the tests set forth by this Court, the specific book in issue is protected against suppression by the First Amendment.

The foregoing is representative but not exhaustive. If the CDL's proposed second brief is to be considered as a document in the case, appellant, we submit, should have an opportunity to deal with its distortions and inaccuracies other than those mentioned above, and to deal with those mentioned in full detail.

Since the arguments on the merits contained in the proposed second brief are in substance the same as those in CDL's extensive first brief, we submit that the motion should be denied. If, however, the motion should be granted, we ask that appellant be given leave to submit a brief in response.

Respectfully submitted,

CHARLES REMBAR,
REMBAR AND ZOLOTAR,
Counsel for Appellant,
521 Fifth Avenue,
New York 17, N. Y.